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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 909

CATHERINE NESA CONTERNO, PETITIONER

v.

NAT ROGAN, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The district court rendered no opinion and its findings of fact and conclusions of law (R. 42–48) are unreported. The opinion of the circuit court of appeals (R. 64–71) is reported in 132 F. (2d) 726.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 31, 1942 (R. 72). A petition for rehearing was denied on February 16, 1943 (R. 73). The petition for a writ of certiorari was filed on April 10, 1943. The jurisdiction of

this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the tax imposed by Section 3030 (a) (1) (A) of the Internal Revenue Code is a tax upon the production of wine, or a tax upon the sale or removal for sale of the wine?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 10–13.

STATEMENT

This is an action brought to recover an alleged overpayment of a wine tax. The case was tried by the district court without a jury (R. 42). The pertinent facts, as found by the district court, may be summarized as follows:

Petitioner was the owner and operator of a bonded winery located at Vista, California, which on December 8, 1939, was destroyed by fire. At that time there was stored in the premises more than 18,153.33 gallons of wine of alcoholic content of 14 to 21 percent by volume, and this wine was irrevocably lost in the fire. (R. 43, 44, 45.) At the time of the fire the wine had not been sold, removed for sale or consumption, hypothecated, or encumbered, nor was there any existing contract to sell it (R. 44). Following the filing by the petitioner on January 15, 1940, of a report

with the Alcohol Tax Unit of the Internal Revenue Service of the Treasury Department showing the loss by fire of the wine, a tax of 10 cents per gallon was assessed in April 1940 on the 18,153.33 gallons. After notification of the assessment and demand for payment, petitioner filed a claim for abatement of the tax, which was rejected. (R. 45–46.) Petitioner thereupon paid the tax, which amounted to $1,815.33 plus a penalty ($90.77) and interest ($31.41). Following rejection of a claim for refund, this suit was started. (R. 46.)

The amended complaint (R. 7–13) contained two causes of action. The first (R. 7–11) was predicated upon the theory that no tax had attached at all. The second (R. 12–13) was predicated upon the theory that if the tax had attached, the Commissioner had arbitrarily refused to make the refund. Although only the first count was tried before the district court (R. 22), the court made some findings, although not complete findings, which were pertinent only to the second cause of action. Before the circuit court of appeals there was some question as to whether the district court had entered judgment upon both the causes of action. However, it was agreed by counsel at the bar of the court that if the judgment of the district court upon the first cause of action should be reversed, the cause should be remanded for trial upon the second. (R. 65.) The circuit court

of appeals reversed the judgment of the district court and remanded the case for trial upon the second cause of action (R. 72). A petition for rehearing was thereafter filed and denied (R. 73).

ARGUMENT

1. Petitioner manufactured wine which was destroyed by fire prior to its sale or removal from the winery for purposes of consumption or sale. The issue turns upon whether the tax imposed by Section 3030 (a) (1) (A) of the Internal Revenue Code[1] (Appendix, *infra*, p. 10) is an excise upon the manufacture of wine, or attaches only at the time of sale. The statute provides in part:

> Upon all still wines, * * * produced in * * * the United States * * * there shall be levied, collected and paid taxes at rates as follows, when sold or removed for consumption or sale:
>
> * * * * *

The circuit court of appeals held that the tax is one upon the manufacture of the wine and that the adverbial clause "when sold or removed for consumption or sale" is a provision designed merely to mitigate the burden of the tax by delay-

[1] This Section was derived from Sections 611 and 613 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, as amended by Section 451 of the Revenue Act of 1928, c. 852, 45 Stat. 791; Section 6 of the Liquor Taxing Act of 1934, c. 1, 48 Stat. 313; Section 319 (c) of the Liquor Tax Administration Act, c. 830, 49 Stat. 1939.

ing the time for payment in the ordinary case until the wine has been sold and the producer put in funds. Since in this case the destruction of the wine by fire made it impossible for it ever to be sold in the future, the tax was due immediately. In this construction of the statute, the court below was squarely supported by *Liggett & Myers Co.* v. *United States,* 299 U. S. 383, in which this Court said of a similar statutory provision which imposed a tax upon tobacco (p. 386):

> The tax is laid upon each pound of manufactured tobacco irrespective of intrinsic value or price obtained upon sale. The goods may be disposed of at any price without affecting the amount of the tax; that does not vary. Always the manufacturer must pay 18 cents upon each pound—no more, no less. True the limit of time for making payment is when the product is sold or removed, but this is a privilege designed to mitigate the burden; it indicates no purpose to impose the tax upon either sale or removal. * * *

See also *R. J. Reynolds Tobacco Co.* v. *Robertson,* 94 F. (2d) 167 (C. C. A. 4), certiorari denied, 304 U. S. 563.

It is to be noted that the *Liggett & Myers* case (299 U. S. at p. 384) was stronger for a construction of the tobacco tax as one upon the sale, for that tax was levied upon "all tobacco and snuff manufactured in * * * the United States, *and*

hereafter sold by the manufacturer * * *," whereas the statute here involved provides: "Upon all still wines, * * * produced in * * * the United States * * *, there shall be levied, collected, and paid taxes at rates as follows, *when* sold * * *." [Italics supplied.] Nor are there any differences between the two taxes which would support a different construction of the wine tax. Petitioner's suggestion (Pet. 22) that such a difference might be found in the fact that the tobacco tax statute declares that the tax is to be paid by the manufacturer is plainly without merit, for even under petitioner's position the wine tax must also be paid, if paid at all, by the producer. And, as in the case of the tobacco tax, the tax here does not vary with the price obtained upon sale.

Moreover, the construction of the statute by the circuit court of appeals is consistent with the provisions allowing the tax-free removal of 200 gallons of wine per year for the family of the producer thereof, and with Section 3039 (a) of the Internal Revenue Code [2] (Appendix, *infra*, p. 11) which grants authority to the Commissioner to make allowances for unavoidable loss of wines while in storage or during cellar treatment.

2. The decision below is in accordance with the long continued administrative construction of this

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[2] This section was derived from Section 622 of the Revenue Act of 1918, c. 18, 40 Stat. 1057.

statute. Following the substitution, by Section 402 (a) of the Revenue Act of 1916, c. 463, 39 Stat. 756, of the type of tax here involved for the earlier tax on sales of wine to consumers (see Section 2 of the Act of Ocober 22, 1914, c. 331, 38 Stat. 745), Treasury Regulations 28, Supplement 2, were adopted in September 1916. Article 16 thereof laid down the conditions under which the Commissioner would make allowances for unavoidable loss of wines, including loss by fire, while in storage or during cellar treatment. The provisions of Paragraphs 173, 174, 176, 179, and 181 of Regulations 7 (1937 ed.) (Appendix, *infra,* pp. 11–13) are similar, though more detailed. Since these provisions speak specifically of losses occurring at the winery, provide for credits or abatement of the tax in appropriate circumstances, and rule that there will be no abatement where there has been indemnification for the tax by insurance, they can only be reconciled with the view that the tax attaches upon the production of the wine. This has been the consistent administrative construction[3] and, although various amendments have been made to the statute[4] from

[3] See T. D. 2545, 19 Treasury Decisions, Internal Revenue 229 (1917); Treasury Regulations 60 (1924 ed.), Sections 570–578; Treasury Regulations 2 (1927 ed.), Sections 712–716; Treasury Regulations 7 (1930 ed.), Paragraphs 131–134, 145–151.

[4] Section 451, Revenue Act of 1928, c. 852, 45 Stat. 791; Section 6, Liquor Taxing Act of 1934, c. 1, 48 Stat. 313; Section 319 (c), Liquor Tax Administration Act, c. 830, 49

time to time, Congress has not seen fit to alter the statute in this regard. Under the familiar rule, the administrative construction must be deemed to have acquired the force and effect of law. *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459; *Helvering* v. *Winmill*, 305 U. S. 79, 83.

3. *Fresno Grape Products Corp.* v. *United States*, 11 F. Supp. 55 (Ct. Cls.), is not precisely in point, although there is some language in the opinion to the effect that the tax here involved does not attach until sale. There the taxpayer added acetic acid to wine which it had on storage and sold the resultant product, which was then not wine, but vinegar stock. In holding that no tax had attached, the court relied upon a Section of the Regulations which provided that, if in the course of production the product should through natural processes become vinegar or vinegar stock rather than wine, no tax would attach. This provision is, of course, not inconsistent with the administrative construction of the tax as one upon the production of wine, for in such a situation no wine would be produced. The court thought, however, that there should be no different result where wine had been initially produced and then had later been converted into vinegar stock by the application of chemicals. In any event, as the court below noted, the *Fresno Grape Products* case

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Stat. 1930; Section 214, Revenue Act of 1940, c. 419, 54 Stat. 516; Section 534, Revenue Act of 1941, c. 412, 55 Stat. 687; Section 604, Revenue Act of 1942, Pub. No. 753, 77th Cong., 2d sess.

was decided prior to the decision by this Court in the *Liggett & Myers Co.* v. *United States,* 299 U. S. 383 (see p. 5, *supra*).

CONCLUSION

There is no occasion for further review. The petition should be denied.

Respectfully submitted.

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MAY 1943.